SUPREME COURT OF THE

Supreme Court of the United States

NOV 15 1974

October Term, 1974

No. 74-590

PREMISES OF RICHARD KASTNER, t/a LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, t/a BIG C DISCOUNT DEPARTMENT STORE, Tenant. Inscribed in Deed Book 4795, Page 324.

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION

Respondent

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION (FORMERLY DEPARTMENT OF HIGHWAYS), FOR RIGHT OF WAY FOR APPROACHES TO BOOTH AVE. SEC. 13-A, IN THE [illegible] JUDICIAL DISTRICT, PHILADELPHIA COUNTY, PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Commonwealth

DAVID H. [illegible]
Attorney for Petitioners

[illegible] Street Road
Cheltenham Township, Pa. 19012

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IN THE

Supreme Court of the United States

October Term, 1974

No.

PREMISES OF RICHARD KASTNER, *t/a* LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, *t/a* BIG C DISCOUNT DEPARTMENT STORE, Tenant, DESCRIBED IN DEED BOOK 1725, PAGE 231,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION,

Respondents

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (FORMERLY DEPARTMENT OF HIGHWAYS), FOR RIGHT OF WAY FOR LEGISLATIVE ROUTE 252, SEC. 10-A, IN BENSALEM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioners, Richard Kastner, trading as Liberty Bell Discount, and Charles Podhaizer, trading as Big C Discount Department Store, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered August 26, 1974.

OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania, as yet unreported, is attached hereto as Appendix A. The opinion of the Commonwealth Court of Pennsylvania, which dismissed Petitioners' claim, is reported in 13 Commonwealth Court Rep. 525 (1974), appears as Appendix B. The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, is reported in 24 Bucks County Law Reporter 163 (1973), and appears at Appendix C. The Commonwealth Court reversed the judgment of the Court of Common Pleas of Bucks County, Pennsylvania, which had remanded the case to the Board of View. A timely petition for allowance of appeal was denied by the Supreme Court of Pennsylvania on August 26, 1974.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on August 26, 1974. See Appendix A. This petition for certiorari was filed less than 90 days from the date aforesaid. This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

When the Commonwealth of Pennsylvania, in the exercise of the power of eminent domain, relocates the street upon which Petitioners' property abuts and vacates the street thereby placing Petitioners' property on a cul-de-sac, resulting in substantial interference with access to Petitioners' property, alteration in the highest and best use of Petitioners' property from commercial to industrial use, and diminution in the value of Petitioners' property from $700,000.00 to $360,000.00, has there been a "taking" of Petitioners' property so as to require the Commonwealth of Pennsylvania to pay "just compensation" to Petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners' property contains approximately eight (8) acres and is located on the northerly side of Street Road near the intersection with U.S. Route 1 in Bensalem Township, Bucks County, Pennsylvania. The Petitioners are the owner of the tract and the tenant of the tract. The tract has 1,098 feet of frontage on Street Road and is 310 feet deep on one side, and 370 feet deep on the other. It is zoned M-1 light industrial, which permits commercial use.

The property is improved with a building of approximately 60,000 square feet. The remaining area is blacktopped for parking purposes. Since 1951, the property has been utilized for commercial purposes as a farmer's market and discount store.

The Commonwealth of Pennsylvania reconstructed Street Road, by vacating that portion of Street Road which is west of the subject property. Where Street Road formerly intersected U.S. Route 1, a barrier has been erected so that Street Road now ends in a cul-de-sac at the intersection. Access to the subject property from all four directions has been severely diminished. Diagrams and a description of the difficulty of access to Petitioners' property are presented in Appendix D.

No Declaration of Taking was filed by the Commonwealth condemning the subject property. As a result of the reconstruction of Street Road and the vacating of Old Street Road at its intersection with U.S. Route 1, Petitioners filed a petition for appointment of a Board of View. Hearings were held before the Board of View.

The Commonwealth presented no testimony in regard to the vacating of Street Road and access to the subject property and no testimony as to damages. The Petitioners

presented two witnesses as to damages, who testified to the following figures:

1. H. Edward Carter	Before—	$700,000.
	After—	360,000.
	Damages—	340,000.
2. Charles Podhaizer	Before—	$750,000.
	After—	400,000.
	Damages—	350,000.

H. Edward Carter, who is an expert appraiser, testified that the effect of the condemnation was to change the highest and best use of the subject property from a commercial use prior to the reconstruction of Street Road to an industrial use after said reconstruction. He further testified that the property lacked good access and identification after the reconstruction of Street Road. (Record 212a before the Commonwealth Court). He also testified that the reconstruction of Street Road had a substantial effect upon accessibility to the subject property. (Record 212a before the Commonwealth Court).

The Board of View found that the Petitioners were not entitled to damages. The Petitioners appealed from and filed objections to the report of the Board of View.

The Court of Common Pleas of Bucks County, Pennsylvania, sustained Petitioners' objections to the report of the Board of View and held that the Petitioners were entitled to damages. The Court referred the matter back to the Board of View for determination by them of the amount of damages to which Petitioners are entitled.

The Commonwealth appealed the Order of the Court of Common Pleas of Bucks County, Pennsylvania, to the Commonwealth Court, which reversed the decision of the Court of Common Pleas.

RAISING THE FEDERAL QUESTIONS

The federal questions here presented were specifically raised in the original Petition for appointment of a Board of View and the Appeal from and objections to the report of the Board of View, and the relevant paragraphs of the Petition and Appeal are set forth in Appendix E. These federal claims were thus made at the earliest opportunity and were reserved at each stage of the proceedings below.

The constitutional claims of Petitioners were raised before the Court of Common pleas and before the Commonwealth Court, as set forth on Pages 83-85 of the Brief of Petitioners (Appellees) before the Commonwealth Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. This case presents an increasingly important question of constitutional law which has not heretofore been decided by this Court.

In a period of massive highway construction, including the interstate highway construction program throughout the United States, the trend toward controlled-access highways and the enormous federal expenditures involved in these programs, the difficult issue of delineating those situations in which there is a constitutional right to just compensation as a result of construction of new highways and vacating of old highways is of great national importance. The impact upon an individual property owner may be enormous, as illustrated by the effect upon Petitioners' property in the instant case. Petitioners' property may no longer be used for commercial purposes; the value of the property has decreased by approximately fifty percent (50%); and the Petitioners have lost almost $350,000.00 as a result of the construction of a new highway and the vacating of the street upon which their property abuts, placing their property on a cul-de-sac.

It is important that there be some explanation and guidance from this Court in regard to when the constitutional provision of just compensation requires that condemnors include the losses of abutting property owners within their estimate of the costs of construction of a new highway. This Court, while recognizing the necessity of compensation in inverse condemnation cases, has not yet addressed itself to the vexing problem of the requirement of just compensation when highway construction and the vacating of existing roads causes condemnees to suffer the kind of loss experienced by the Petitioners in the instant case. Moreover, it is equally as important that this Court distinguish the kinds of situations in which compensation will be required from those in which compensation may constitutionally be denied.

2. Just compensation is constitutionally required when the condemnor exercises the power of eminent domain so as to cause a substantial diminution in value of the condemnee's property as a result of substantial interference with access to that property.

It is obvious that not every property owner who suffers a loss in the value of his property has a constitutional right to just compensation, even if the loss is occasioned by the construction of a new highway. The requirement of just compensation must, as a very minimum, be recognized in those situations in which the following elements are present:

(a) Condemnee's property suffers a substantial interference with access as distinct from a more circuitous method of access or a more inconvenient method of access;

(b) The interference with access is so severe as to result in a detrimental change in the potential uses of the condemnee's property; and

(c) The diminution in value of condemnee's property is substantial, both in terms of the comparative value of the property after the taking as compared to before the taking and the monetary amount involved.

It should be beyond dispute that if, as a result of new highway construction, the subject property is landlocked, the landowner would be entitled to just compensation. The question that msut be resolved by this Court is whether landowners who suffer substantial interference with access, short of being completely landlocked, are also entitled to just compensation. The issue has not been resolved by this Court. The state courts, in considering the national standard of the constitutional requirement of just compensation, have reached varying results. See *People v. Riccardi*, 23 C.2d 390, 144 P.2d 799 (California, 1944); *City of Waco v. Texland Corporation, et al.*, 446 S.W. 1 (Texas, 1969); *Department of Public Works v. Ramos*, 81 Calif. Rep. 792,

1 Calif. App. 3rd 261 (Supreme Court of California, 1969); *Balog v. State Department of Roads*, 7 Mc. A.264, 151 N.W.2d 402 (Nebraska, 1964); *James v. State*, 88 Idaho 175, 397 P.2d 766 (1964); *Stefan Auto Body v. State Highway Commission*, 21 Wisc.2d 263, 124 N.W. 2d 319 (1963); *State Highway Commission v. Silva*, 71 N.M. 350, 378 P.2d 595 (1963); and *Ray v. State Highway Commission*, 196 Kan. 13, 410 P.2d 278 (1966). In fact, the courts in Pennsylvania seem to have differed in regard to this issue. *In re Melon Street*, 182 Pa. 397 (1897); *Hedrick v. Harrisburg*, 278 Pa. 274, 122 Atl. 281 (1932); *Bodemer v. Co. of Northampton*, 101 Pa. Super. Ct. 492 (1930); *Mitchell Condemnation Case*, 209 Pa. Super. Ct. 288, 228 A.2d 53 (1967); and *Hession Condemnation Case*, 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied*, 393 U.S. 1049 (1969).

The instant case is an appropriate one for consideration of this issue since the instant case involves a clear instance of a substantial interference with access, which was described by the Court of Common Pleas of Bucks County, Pennsylvania, as follows:

> "Petitioners in the case before us have obviously been put in a situation which has a strong impact on them individually. Their property directly abuts the road which has been vacated, and the road closing itself is within 300 feet of their property line. They have been completely deprived of the ready access to the highway system which they had before, and entry onto their property from at least three of the four possible directions has been severely impeded. If their situation is not demonstrative of a substantial interference with access, then we are hard pressed to envision anything short of a total deprivation thereof which could meet the test which the law imposes. (Appendix C, p. A-23, infra).
>
> "This is not a mere question involving re-routing of traffic by construction of competing roads, but rather one which involves substantial interference with rights of access, so severe as to be tantamount

> to a denial of the access which Petitioners enjoyed prior to construction of highway improvements. Petitioners' injury is personal to them, immediate (rather than remote), and could in no way reasonably be shrugged aside as a 'slight inconvenience.'
> (Appendix C, p. A-23 infra).
>
> "If the impairment of access in the Melon, Hedrick and Bodemer cases was held to be compensable, then there certainly must be a compensable injury to Petitioners in the case now before us, since the facts of record indicate that their injury is closer in degree to total destruction (deprivation) of access than was that of the condemnee in any of the earlier cases."
> (Appendix C, p. A-24, infra).

In addition to the substantial interference with access as found by the lower court, the testimony is undisputed that the Petitioners' property will no longer be useful for commercial purposes. Finally, not only is the interference with access substantial, but the injury to the Petitioners is substantial as reflected by the diminution in value of their property of approximately fifty percent (50%) and the loss in absolute dollar terms of almost $350,000.00.

3. Substantial interference with access requires just compensation as distinguished from loss resulting from diversion of traffic.

In addition to providing some guidance in regard to the circumstances under which there is a substantial interference with access, it is equally important that this Court distinguish those cases involving substantial interference with access from those cases in which the loss is occasioned by diversion of traffic or traffic controls. Losses resulting from diversion of traffic may occur in a great variety of situations. Traffic flow of a particular volume in front of a specific tract of land is not a property right. This Court has previously denied certiorari in a case involving the

diversion of traffic. *Hession Condemnation Case*, 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied*, 393 U.S. 1049 (1969).

Access, however, both in regard to the landowner himself and his patrons, is a property right. The issue of the constitutional right to just compensation when there is a substantial interference with access remains open.

This concept is inherent in the litigation which came before this Court in *Martin v. Creasy*, 360 U.S. 219 (1959). That litigation involved the asserted right of abutting landowners to direct access to a limited-access highway, an issue which this Court refrained from deciding on the basis of the "abstention" doctrine. Involved in that case was the Pennsylvania Limited-Access Highways Act which authorized the Pennsylvania Governor and Secretary of Highways to declare any highway, or part thereof, to be a "limited access highway" and further provided that "the owner or owners of private property affected by the construction or designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. . . ."

The owners of service stations, restaurants and other commercial properties abutting a section of an existing free-access highway between downtown Pittsburgh and the Greater Pittsburgh Airport brought an action in federal court to restrain the Governor and Secretary of Highways of Pennsylvania from designating that section of road as a "limited access highway", claiming that such action would deprive them of their property without due process because the Act did not provide compensation for their loss of direct access to the highway. The district court initially stayed proceedings to enable the parties to seek a determination of their rights in the Pennsylvania courts. The state courts did not determine whether the owners were entitled to compensation but held that the appropriate procedure would be for the plaintiffs to wait until the Commonwealth took action and then to proceed before viewers in the ordinary course, at which time their rights would

be protected. *Creasy v. Lawler*, 8 Pa. D. & C. 2d 535, 538-39 (1956), *aff'd. per curiam*, 389 Pa. 635, 122 A.2d 178 (1957). The district court then proceeded to adjudicate the merits of the controversy. *Creasy v. Stevens*, 160 F.Supp. 404 (W.D. Pa. 1958). Noting that "the right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation" and that "the Pennsylvania courts have also recognized it as a property right", 160 F.Supp. at 411, the District Court held that the deprivation of the abutting owner's access to the highway would constitute a "taking of property in the constitutional sense." *Id.* at 412. It then read the statute as not providing compensation for the abutting owners in the absence of a physical taking of their land. *Id.* at 414-16. "For that reason the court found the statute repugnant to the Due Process Clause of the Fourteenth Amendment", 360 U.S. at 223, and permanently enjoined the Governor and Secretary of Highways from proceeding.

This Court reversed, holding that it was improper for the District Court to issue an injunction when there appeared to be a complete and adequate remedy under state law. The Court concluded that:

> ". . . There is no question here of the State's right to create or designate a limited access highway. The only question is the plaintiff's right to compensation. It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights under the United States Constitution will be preserved. Assuming, however, that there was a basis to support intervention by a court of equity, the District Court, we think should nevertheless have declined to adjudicate this controversy." *Martin v. Creasy*, 360 U.S. at 224.

The Court held that abstention was required not only on the basis of federal-state relationships but also on the

basis of the specific factual situation involved in the case, stating the following:

> "At least one additional reason for abstention in the present case is to be found in the complex and varying effects which the contemplated state action may have upon the different landowners. Some of them may be completely deprived of access; others may have access to existing roads or service roads to be constructed; still others may have access to the highway itself through points of ingress and egress established under the statute. In the state court proceedings the case of each landowner will be considered separately, with whatever particular problems each case may present.
>
> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property'. If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." *Martin v. Creasy*, 360 U.S. at 234-25.

Martin v. Creasy represents the most recent expression by this Court concerning the right of abutting property owners to access to highways. Unlike *Creasy*, this case squarely presents the question for decision.

The instant case clearly involves the question of interference with access rather than diversion of traffic and the Petitioners have never claimed compensation for diversion of traffic. Moreover, the Petitioners' property, as a result of the highway construction and the vacating of the street upon which their property abuts, has been placed in a cul-de-sac. As a result of this alone, access to Petitioners' property from at least one direction has been completely eliminated. The distinction between those cases in which there has been a substantial interference with access that is the result of being placed in a cul-de-sac and other types

of interference with access has been recognized by the Commonwealth of Pennsylvania (the condemnor in the instant case) in its brief in the *Hession* case (in which the Commonwealth of Pennsylvania was also the condemnor) before the Supreme Court of Pennsylvania in which the Commonwealth recognizes that the situation in *Hession* does not concern a cul-de-sac:

> "In order for recovery to be had when a street is vacated, but no land is taken, the property owner must be left in a position which is unique and substantially different than that of his neighbors and the public generally. An example of this would be when the affected property has been left at the end of a street which became a cul-de-sac as the result of the taking. This is not the situation in the case at bar." Commonwealth's Brief in *Hession Condemnation Case*, 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied*, 393 U.S. 1049 (1969) (a photostatic copy of this brief will be filed with this petition).

Despite having taken this position in the *Hession* case, the Commonwealth insists in the instant case that the Petitioners are not entitled to compensation even though the Petitioners have clearly had their property placed in a cul-de-sac, suffered a substantial interference with access to their property from three out of four possible directions (as specifically found by the Court of Common Pleas), have undeniably suffered a detrimental change in the highest and best use of their property, and have suffered a monetary loss of almost $350,000.00.

4. The constitutional requirement of just compensation applies to "taking" by the states.

It has long been established in this Court that the "due process" clause of the Fourteenth Amendment to the Constitution has made applicable to the states the Fifth Amendment's prohibition against "taking" private property for

public use without just compensation. See *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) and *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). It is clear that a "taking," in the constitutional sense, is not limited to actual physical possession or seizure of the property. See, *e.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), holding that Pennsylvania's Kohler Act effected an unconstitutional "taking" even though the Act merely prohibited underground mining which would cause subsidence of surface structures. "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States v. General Motors*, 323 U.S. 373, 378 (1945).

In *United States v. Causby*, 328 U.S. 256 (1946), the United States, by flying its military aircraft frequently on low landing and takeoff flights over the condemnee's premises, had so disturbed the peace and quiet as to destroy its use as a commercial chicken farm. Over the Government's objection that any damages to the condemnee's property were merely "consequential" and not compensable, the Court held that the Fifth Amendment required the Government to pay just compensation, stating that the fact that the land might have some value (albeit diminished) after the taking did not make the action of the Government any less of a "taking." 328 U.S. at 262-263. "The damages were not merely consequential. They were the product of a direct invasion of condemnee's domain." 328 U.S. at 265-66.

In *Griggs v. Allegheny County*, 369 U.S. 84 (1962), the Court required Allegheny County, Pennsylvania, to pay "just compensation" to a local resident whose home was located below one of the approaches to the County's Greater Pittsburgh Airport, where the noise and vibration from the low altitude flights over the condemnee's home were so

unbearable that the condemnee was forced to vacate the premises.

In the *Causby* and *Griggs* cases, this Court demonstrated an acute awareness of the plight of the small property owner—an innocent victim of progress, who finds his home or business destroyed by governmental projects, even though there has been no physical seizure of his property. In rendering those judgments, this Court, no doubt, expected the lower courts to follow the approach laid down in these cases. See, also, *United States v. Kansas City Ins. Co.*, 339 U.S. 799 (1950), where this Court required the Federal Government to compensate the owner of farm land adjacent to a tributary of the Mississippi River for destruction of the agricultural value of the land caused by raising the waters of the river above their ordinary high-water mark, notwithstanding that there was no actual flooding of the land. See also *Almota Farmers Elevator and United States Whse. Co. v. U.S.*, 409 U.S. 470 (1974).

The Commonwealth Court of Pennsylvania in the instant case ignored the teachings of *Causby* and *Kansas City*, thus failing to consider the elements involved in those situations in which there is a constitutional requirement of compensation. The court simply assumed that a property owner has no right to compensation for governmentally-caused loss of value if the injury is a substantial interference with access which stops slightly short of a complete denial of access.

In view of the enormous amount of new highway construction in the United States, it is of critical importance that this Court now establish guidelines to be applied by the lower courts in dealing with the impact on landowners of highway construction, relocation, and vacation.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

DAVID H. MOSKOWITZ
Attorney for Petitioners

APPENDIX A

Supreme Court of Pennsylvania

EASTERN DISTRICT

SALLY MRVOS
PROTHONOTARY
LAURA E. LITCHARD
DEPUTY PROTHONOTARY

Philadelphia 19107

September 3, 1974

David H. Moskowitz, Esq.,
3600 Street Road
Cornwells Heights, Pa. 19020

In re: Commonwealth of Pennsylvania, Department of Transportation v. Richard Kastner, t/a etc. et al.
Petitioners.
No. 1478 Allocatur Docket

Dear Mr. Moskowitz:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from Judgment of the Commonwealth Court, in the above captioned matter:

"August 26, 1974

Petition Denied
Per Curiam."

Very truly yours,

Laura E. Litchard

Deputy Prothonotary

LEL:mb

CC: George Bristol, Esq.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, *Appellant*	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	
RICHARD KASTNER, t/a LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, t/a BIG C DISCOUNT DEPARTMENT STORE, *Appellees*	No. 853 Commonwealth Docket 1973

Before:

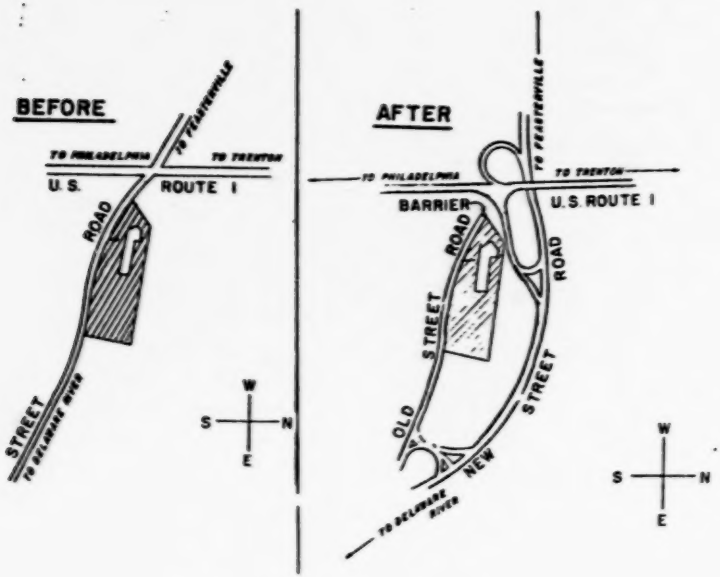
HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: April 3, 1974

OPINION

OPINION BY JUDGE WILKINSON, May 20, 1974

Appellees-condemnees' property, containing approximately eight acres on which is erected a sixty thousand square foot farmers' market and discount store with the remaining surface improved as hard surface parking, is located on the northerly side of Street Road near its intersection with U. S. Route 1 in Bucks County. Appellees-condemnees are the owners of the tract and the tenant. The Commonwealth has constructed a "bypass" for traffic on Street Road, vacating its old crossing of U. S. Route 1 and erecting a barrier where it previously crossed. The lower court, in its opinion, accurately portrayed the before and after condition with regard to this road network with the following diagrams:



Appellees-condemnees filed a petition for appointment of a Board of View pursuant to Section 504 of the Eminent Domain Code, Act of June 22, 1964, P. L. 84, Special Sess., 26 P. S. §1-504. The Board of View was appointed and two hearings were held. Appellees-condemnees presented the testimony of two experts who testified that the appellees-condemnees had suffered a $340,000.00 or $350,000.00 loss as a result of the change in the road network. The Commonwealth did not present any testimony, taking the position that the appellees-condemnees did not suffer any compensable damages. The Board of View concluded that the appellees-condemnees were not entitled to any damages under either Section 612 or Section 613 of the Eminent Domain Code, 26 P. S. §1-612 or §1-613.

On appeal to the Court of Common Pleas from the decision of the Board of View, it was stipulated that no questions of the constitutionality of Section 612 or Section 613 of the Eminent Domain Code would be raised, and the sole issue before the court below was the same as it is here, i.e., did the relocation of Street Road result in such substantial interference with access to appellees-condemnees' property so as to entitle them to compensation under Sections 612 and 613 of the Eminent Domain Code? The lower court found that it did, sustained the appeal from the Board of View, and referred the case back to the Board for the determination of the amount to which appellees-condemnees were entitled. We must reverse.

The case has been exceptionally well presented to the Board of View, exceedingly well analyzed and discussed by the Board of View in its decision and by the able court below in its opinion, as well as forcefully briefed and argued before this Court. This Court feels that the holding of our Supreme Court in *Hession Condemnation Case*, 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied*, 393 U.S. 1049 (1969), is controlling. It is agreed by all parties that no land has been taken, there has been no change in grade, and there has been no injury to surface support. It is entirely a matter of access.

No good purpose would be served by here repeating Justice Roberts' clear exposition of the law relating to this case in his opinion in *Hession*. He expressly dealt with the cases prior to as well as following the adoption of the Eminent Domain Code in 1964, including *In re Melon Street*, 182 Pa. 397, 38 A. 482 (1897); *Breinig v. Allegheny County*, 332 Pa. 474, 2 A.2d 842 (1938); *Spang & Co. v. Commonwealth*, 281 Pa. 414, 126 A. 781 (1924); as well as *Wolf v. Department of Highways*, 422 Pa. 34, 220 A.2d 868 (1966), decided after the passage of the Code but under the law as it existed prior thereto when the case arose; and *Mitchell Condemnation Case*, 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1967).[1] In *Hession*, Justice Roberts reviewed these cases and concluded that "where the result of a condemnor's action is to compel the allegedly affected property owner to travel a short distance farther to reach the system of streets going in a specific direction, this slight inconvenience is not compensable", 430 Pa. at 278, 242 A.2d at 434.

Appellees-condemnees attempt to avoid the *Hession* decision by stating that in that case, there was an intersecting street between the property and where the street on which it fronted was closed. Putting it another way, appellees-condemnees argue that in *Hession*, access from only one out of four directions had been affected, whereas here it was affected in at least three out of the four directions, if not all four.

It is apparent to us that while appellees-condemnees and the court below agree that the appellees-condemnees are not entitled to damages for the loss of traffic occasioned by the re-routing on the new highway, nevertheless appellees-condemnees would have us hold that if the travelling public cannot see the property from the new traffic pattern, its "identification" is lost. By this, they attempt to avoid the appellant's proper argument that the short increased dis-

1. A comprehensive collection of the cases in Pennsylvania as well as in other jurisdictions is published in a comment in 30 U. Pitt L. Rev. 671 (1969), under the title, "Traffic Oriented Business and Highway Vacations: a Diversion".

tance that a person must travel to get to the property may be more than offset in time travelled, using the new, improved traffic pattern, clover leafs, etc. It might also have been argued that under the new traffic pattern, a person moves with increased safety in obtaining access to the property.

The carefully considered opinion of the lower court falls into the same error of confusing loss of access and loss of traffic when it states:

> "We will not dwell on the distinctions between cases concerned with diversion of traffic and those concerned with loss of access, except to note that the former are clearly inapplicable to the facts of the instant case. Petitioners do not base their claim for compensation upon a showing that traffic has been re-routed so that it no longer flows directly past their door; rather, they contend that their land has, in effect, become landlocked because the circuitous route which *traffic* must now take to reach their door is so unresonable as to constitute a loss of access." (Emphasis supplied.)

The following quotation from *Hession* could just as readily have been written of this case and its record:

> "The record before the viewers makes it evident that the damage suffered by appellees is a product of the fact that the elevated highway has transformed what was once a heavily traveled highway (State Road) into a street which carries primarily local traffic only.[1] In essence, appellees base their claim on a belief that

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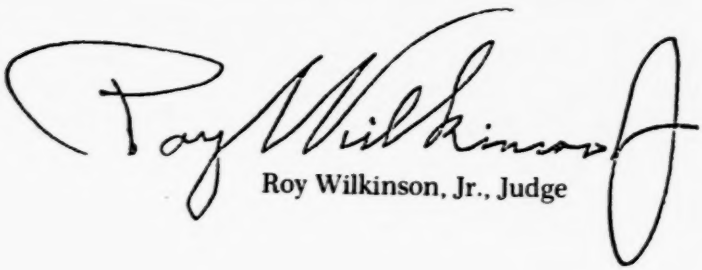
1. "Prior to the construction of the elevated highway, State Road was used to avoid heavy traffic on both Torresdale and Frankford Avenues. The testimony of appellees' two real estate appraisers makes it evident that their estimates of the damage suffered is based totally upon loss of traffic. One appraiser characterized the present location of appellees' tavern restaurant as 'inconspicuous' while the other stated that the elevated highway had destroyed all 'profitable use' of the premises."

the change in the traffic pattern caused by the construction of the expressway and the concomitant decrease in the value of their land as a business property is compensable; they urge this Court to distinguish between properties used for business purposes and those employed as residences and contend that business establishments do have a compensable interest in the traffic pattern existing before a street has been vacated. This argument was considered and expressly rejected in Wolf v. Department of Highways, 422 Pa. 34, 220 A.2d 868 (1966)." 430 Pa. at 278-9, 242 A.2d at 434-5.

Accordingly, the order of the Court of Common Pleas of Bucks County is reversed and the record remanded with instructions to enter judgment for the Commonwealth.



Roy Wilkinson, Jr., Judge

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF BUCKS COUNTY
CIVIL ACTION—LAW

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, (FORMERLY DEPARTMENT OF HIGHWAYS), FOR RIGHT OF WAY FOR LEGISLATIVE ROUTE 252, SECTION 10-A, IN BENSALEM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA — No. 403

December Term, 1970

PREMISES OF RICHARD KASTNER, *t/a* LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, *t/a* BIG C DISCOUNT DEPARTMENT STORE, TENANT, DESCRIBED IN DEED BOOK 1725, PAGE 231

Eminent Domain

Before: Beckert, Garb, Rufe, JJ.

OPINION AND ORDER OF THE COURT

The question before us for resolution is whether the petitioners are entitled to be compensated under Sections 612 or 613 of the Eminent Domain Code [Act of June 22, 1964, P.L. 84, 26 P.S. §1-612 and 1-613] by reason of interference with access to their property or by virtue of the vacating of old Street Road west of their property.

The matter is before us by petitioners' objections to the report of the board of view filed with this court. The board found that the petitioners were not entitled to damages. We are inclined to disagree with the board's finding.

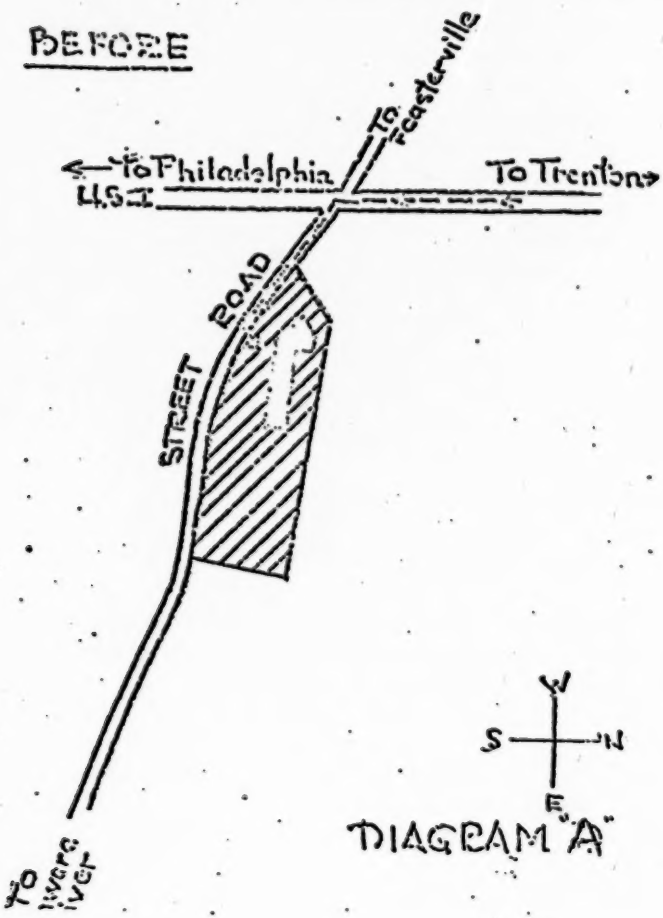
The factual background of the case is not in dispute, and is as follows:

Petitioner Richard Kastner, t/a Liberty Bell Discount, owns a tract of land approximately 8 acres on the northerly side of Street Road near where that road intersects with U.S. Route 1 in Bensalem Township, Bucks County, Pennsylvania, and the petitioner Charles Podhaizer, trading as Big C Department Store, occupies a portion of the tract as a tenant. The tract has 1,098 feet of frontage on Street Road and 310 feet deep on one side and 370 feet deep on the other. It is situate in an M-1 Light Industrial zoning area which permits commercial use. There is a building of approximately 60,000 square feet thereon and the remaining 6 acres are blacktopped. The property has been utilized as a commercial outlet since 1951.

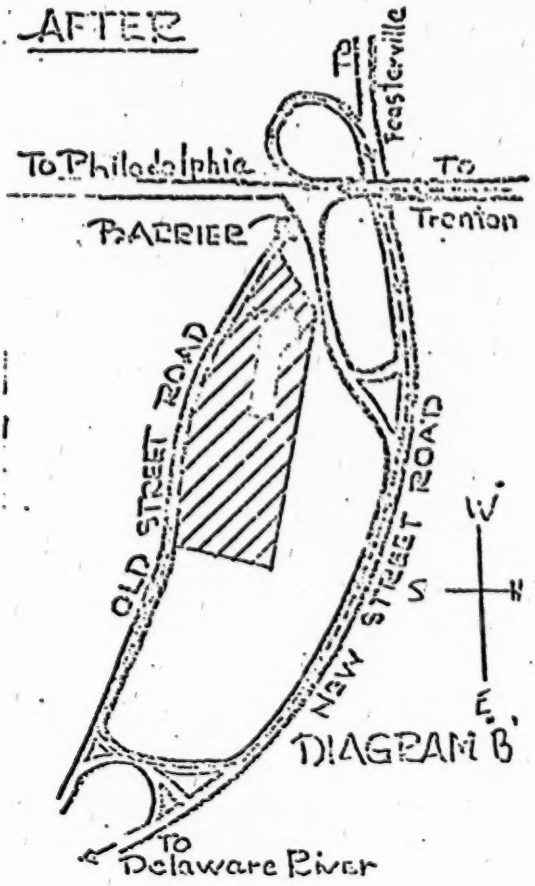
The Commonwealth of Pennsylvania has reconstructed Street Road by vacating that portion which lies to the west of the subject property. Where Street Road formerly intercepted U.S. Route 1 a barrier was erected so that now Street Road ends there in a cul-de-sac. As a result of these changes, access to petitioners' property has been altered in the following ways:

(1) Access from the north:

(a) before reconstruction—vehicles travelling south on Route 1 make a left turn onto Street Road, travel about 300 feet and make another left turn into the subject property. See diagram "A".



(b) after reconstruction—vehicles travelling south on Route 1 turned right to a jughandle, go under Route 1 to new Street Road, make a right turn at Kingston Way, which runs into old Street Road, make another right turn onto old Street Road and then a right into the subject property. The additional distance required is just under one mile. See diagram "B".



(2) Access from the south:

(a) before reconstruction—vehicles travelling north on Route 1 made a right hand turn onto Street Road, then a left hand turn into the subject property. See diagram "C".

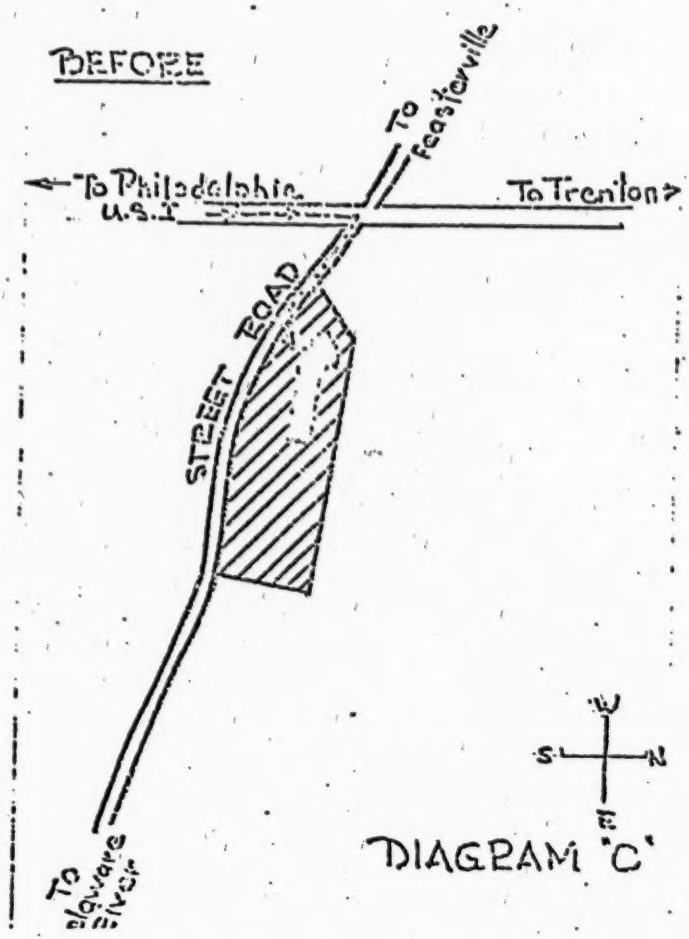
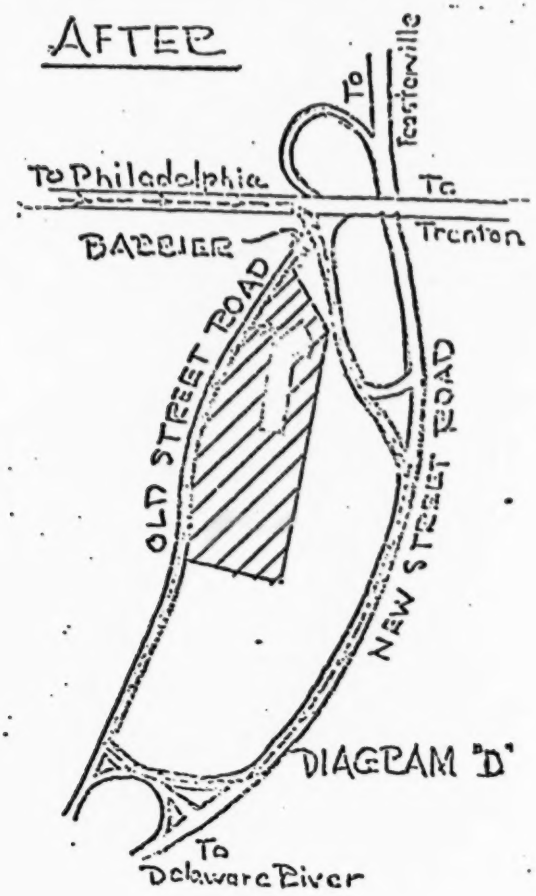


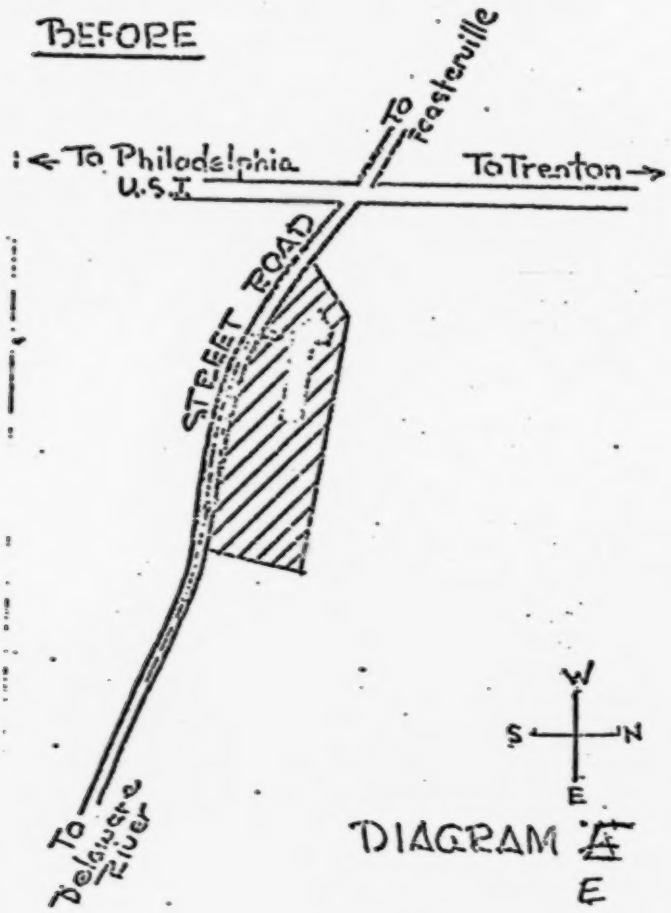
DIAGRAM "C"

(b) after reconstruction—vehicles proceeding in a northerly direction would pass old Street Road, make a right turn onto a ramp which takes them to new Street Road, proceed on new Street Road to Kingston Way, make a right turn at Kingston Way to old Street Road, turn right and proceed to subject property which is entered by a final right turn. The additional distance is just under one mile. See diagram "D".

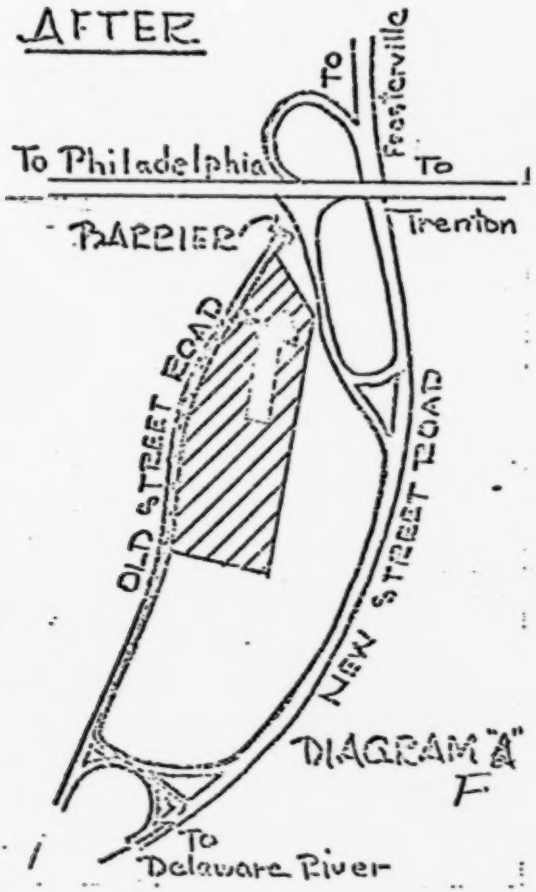


(3) Access from the east:

(a) before reconstruction—vehicles heading west on Street Road merely had to make a right turn into the subject property. See diagram "E".



(b) after reconstruction—vehicles travelling west on new Street Road make a left hand turn into Kingston Way and proceed to old Street Road where they turn right, travel to the subject property which is entered by a final right turn. The additional distance travelled is just under one-tenth of a mile. See diagram "F".



(4) Access from the west:

(a) before reconstruction—vehicles going east on Street Road simply crossed Route 1 and made a left turn into the subject property. See diagram "G".

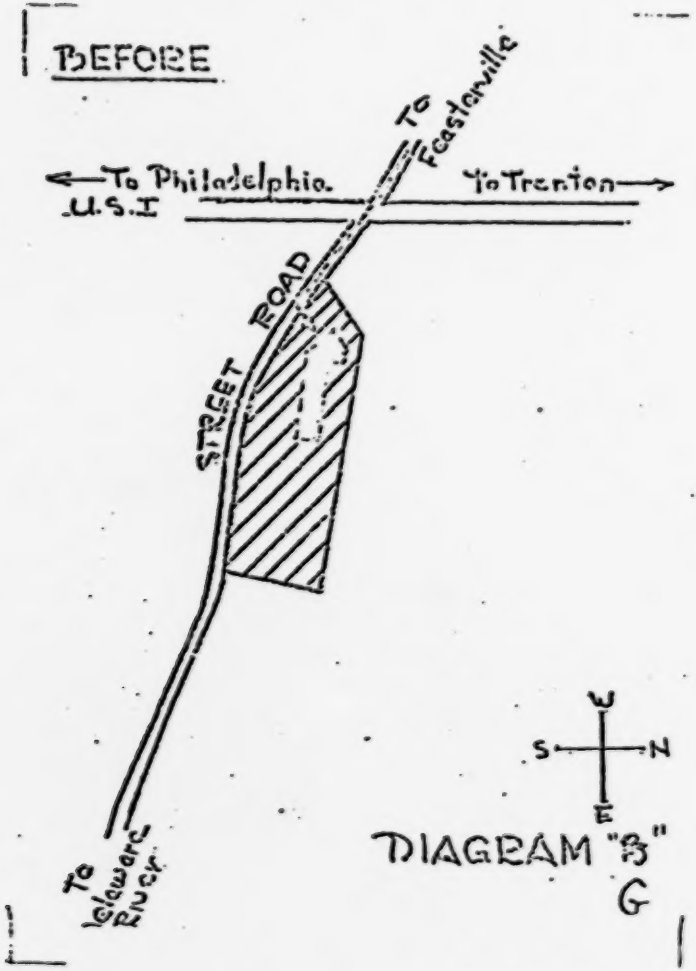
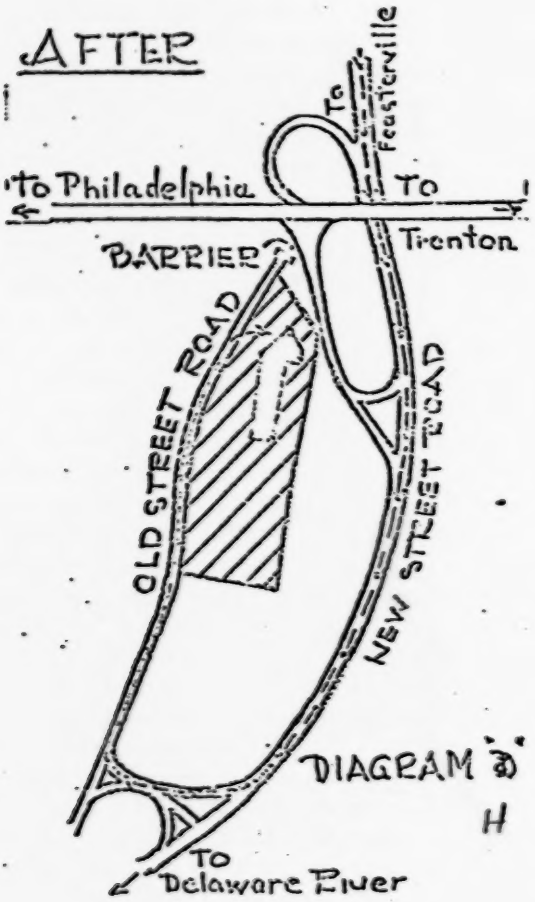


DIAGRAM "B"
G

(b) after reconstruction—vehicles passed under Route 1, turned right onto Kingston Way, proceeded to old Street Road, turned right again, continued to subject property which is entered by a final right turn. The additional distance travelled is one and one-fourth miles. See diagram "H".



No declaration of taking had been filed by the Commonwealth, but as a result of these changes the petitioners filed a petition for appointment of a board of view pursuant to Section 504 of the Eminent Domain Code. A hearing was held before the board of view on July 16, 1971 for the taking of testimony. The Commonwealth presented no testimony on damages whereas petitioners presented the testimony of two experts, who testified that the resultant damages to the petitioners amounted to $340,000. and $350,000. respectively. As previously stated, in their report the board of view found that petitioners were not entitled to damages under the aforementioned section of the Eminent Domain Code and we are now considering petitioners' appeal from and objections to that report.

The objections raised by this appeal appear to be bottomed on Section 517 of the Eminent Domain Code which provides, inter alia, that "All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily. The court may confirm, modify, change the report or refer it back to the same or other viewers. A decree confirming, modifying or changing the report shall constitute a final order."

As the parties are in accord with respect to the facts concerning the physical changes brought about by the relocation of Street Road, we appear to be confronted only with the necessity of determining whether the viewers' finding that the facts of record were insufficient to establish injury within the meaning of Sections 612 and 613 of the Eminent Domain Code was correct. We believe that Section 517 of the Code, as previously set forth, endows in us a broad discretionary power to resolve the petitioners' objections to the report of the viewers in whatever manner we feel is most expeditious under the circumstances of the case. Our ruling will therefore be restricted to the fundamental substantive question previously set forth, and as we find that the activities of the Commonwealth resulted in a "taking" or compensable injuries to the petitioners' property we shall, in our decree, modify the viewers' report accordingly

and direct that the case be resubmitted to the same board of view for the purpose of taking additional testimony on the question of the amount of damages to which petitioners are entitled.

The first question to be dealt with is whether the statutory sections upon which petitioners base their prayer for relief authorize such relief to be granted under the circumstances which are before us. We understand Section 612 of the Eminent Domain Code to specifically allow damages to be awarded against the Commonwealth, regardless of whether any property is actually taken, where there is a sufficient showing of permanent interference with access to the property which abuts the area of improvement. While the Joint State Government Commission comment which follows that section clearly does point out that "under existing law the Commonwealth is not liable for consequential damages unless liability therefor is expressly provided by statute," we construe that comment to be merely a statement of what the law was *prior to* the enactment of the new 1964 Code. In view of the precise language employed in the present Section 612 there appears to be little doubt but that the intent of the legislature was to impose upon the Commonwealth the same degree of liability for consequential damages as was previously imposed upon all other condemnors. It is equally clear from the comment accompanying Section 613 and from the relevant discussion in *Hession Condemnation Case*, 430 Pa. 273 (1968) that that section (which speaks in terms of "damages for any injuries" sustained by an owner affected by the vacation of a street) does not alter case law in effect at the time of its passage. Despite the words "any injuries" in the statute, the situations within which damages may be awarded are still limited by prior cases concerned with vacation of roads.

We conclude that petitioners' action is a proper one and that they are entitled to relief under the Eminent Domain Code of 1964 as they have satisfactorily demonstrated that they have suffered compensable injuries within the ambit of the cases, past and present.

Hession, supra, is the only factually similar case decided by our Supreme Court since the enactment of the Eminent Domain Code of 1964. *Hession* mentions and impliedly reaffirms, at page 277, the validity of *In Re: Melon Street*, 182 Pa. 397 (1897), which held that the proper standard to be applied in establishing the extent of condemnor's liability for vacation of streets is "whether the affected owner has suffered an impairment of access to his property. Access, in turn, has been defined by our cases to be the right of ingress and egress."

When this test was applied by the *Hession* court they concluded that the appellees had suffered at most only a slight inconvenience which was not compensable, since in three out of four possible directions of travel from their property access was in no way impaired. Citing several earlier cases Justice Roberts re-emphasized that ". . . the result of condemnor's action is to compel the allegedly affected property owner to travel a short distance farther to reach the system of streets going in a specific direction, this slight inconvenience is not compensable." Id. See, e.g., *Spang v. Commonwealth*, 281 Pa. 414 (1924); *Mitchell Condemnation Case*, 209 Pa. Superior Ct. 288 (1967).

The instant case seems readily distinguishable from *Hession* in that petitioners have been subjected to a considerable inconvenience in travelling to and from their property in three directions, and some lesser degree of inconvenience in a fourth direction, whereas in *Hession* three out of four directions of travel remained virtually unchanged after vacation of the street was accomplished. It is difficult for us to view as a "slight inconvenience" the necessity to travel an additional one to one-and-one-quarter miles in order to enter upon petitioner's property from any of the three access routes, most affected by the Commonwealth's reconstruction (north, south and west). Rather, we would view as slight inconvenience the one-tenth of a mile which was added to the distance one must travel in approaching petitioners' property from the east. What is

important is that every possible avenue of approach to the property has been appreciably affected.

The *Melon* case, supra, is the leading Pennsylvania case dealing with vacation of streets. There, as is the case with the present petitioners, the condemnees were owners of property which fronted on the street which was vacated, but they did not abut that specific part of the street which was closed. The effect of the closing was to deny access to the subject property by 50% at most. However, the Supreme Court still found that there was a depreciation in value of the property by reason of the closing of the street, which impaired the condemnees' special right of ingress and egress. An injury to their property rights was proven which was peculiar unto themselves and differed in kind from the injury sustained by other passersby who used the street for travel only. (*Melon*, 402) On the following page of their opinion, the court dealt with the special nature of an abutting owner's rights:

> "Where the part of a street in front of a property is vacated the owner's right to compensation is conceded, but the right is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover, at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right no distinction can be drawn be-

> tween a partial and a total deprivation of access; the impairment of the right is a legal injury differing in degree only from its total destruction."

In Re: Melon Street, 182 Pa. at 403-04.

We will not dwell on the distinctions between cases concerned with diversion of traffic and those concerned with loss of access, except to note that the former are clearly inapplicable to the facts of the instant case. Petitioners do not base their claim for compensation upon a showing that traffic has been re-routed so that it no longer flows directly past their door; rather, they contend that their land has, in effect, become landlocked because the circuitous route which traffic must now take to reach their door is so unreasonable as to constitute a loss of access.

Mitchell Condemnation Case, 209 Pa. Superior Ct. 288 (1967) stands for the oft-repeated proposition that not every interference with a property owner's access to the street upon which his property abuts is compensable, and that in order for liability to exist there must be *substantial* impairment of the access. The Superior Court, in denying the Mitchells' claims for damages, approvingly quoted from a relevant Missouri decision: "Respondent's property right of access has never extended further than the right to enter upon the highway or to leave it and have reasonable connection to the public road system." *State of Missouri ex rel. State Highway Commission v. Meier*, 388 S.W. 2d 855, 857, cert. den. 382 U.S. 846, 86 S.Ct. 79, 15 L. ed. 2d 86 (1965).

In *Mitchell* there was a closing of a route at a point more than a half mile from the condemnees' driveway. Prior to the closing, if the Mitchells wanted to reach Route 519, a state highway and the main road through the area, their most direct route was to drive out their private road to Township Route 708, where they would turn left and travel a distance of about 1,000 feet to Route 573, which in turn took them to Route 519. (The latter road ran to Canonsburg in one direction or to Hendersonville in the

other). By the addition of the new limited access highway Route 763 was cut off between the intersections with Routes 708 and 519, which necessitated the Mitchells to follow more circuitous routes over country roads in order to reach Route 519.

It was held improper for the cutting off of Route 763 to have been considered before the lower court, since the Mitchells' farm did not abut the road closed and since it was more than a half mile from their driveway. Their ease of access to public roads via their own private road was unaffected. In short, they were in no different position than their neighbors and had suffered no peculiar harm.

Petitioners in the case before us have obviously been put in a situation which has a strong impact on them individually. Their property directly abuts the road which has been vacated, and the road closing itself is within 300 feet of their property line. They have been completely deprived of the ready access to the highway system which they had before, and entry onto their property from at least three of the four possible directions has been severely impeded. If their situation is not demonstrative of a substantial interference with access then we are hard pressed to envision anything short of a total deprivation thereof which could meet the test which the law imposes. Certainly the framers of Section 612 of the Code calling for the payment of consequential damages "for a permanent interference with access" or Section 613 "Whenever a public road, street, or highway is vacated, the affected owners may recover damages for any injuries sustained thereby, even though no land is actually taken" did not contemplate a total loss of all use to the property. This is not a mere question involving re-routing of traffic by construction of competing roads, but rather one which involves substantial interference with rights of access, so severe as to be tantamount to a denial of the access which petitioners enjoyed prior to construction of highway improvements. Petitioners' injury is personal to them, immediate (rather than remote), and could in no way reasonably be shrugged aside as a "slight inconvenience."

We hold that *Melon* is still the law of this Commonwealth, and that *Hession* is consistent therewith. The determinative factor in all of the cases is the extent or degree to which access was interfered with: *Hedrick v. Harrisburg*, 278 Pa. 274 (1932) and *Bodemer v. County of Northampton*, 101 Pa. Superior Ct. 492 (1930) seem to have important factual similarities to the instant case. While *Bodemer* admittedly concerned itself with a relocation of a highway and resultant diversion of traffic away from the condemnee's hotel and gas station, there was also a closing off of the road on which the condemnee's property abutted, quite similar to the creation of a cul-de-sac near the petitioners' property. In *Hedrick* although a cul-de-sac was created at the end of a street on which the condemnee's property abutted, access remained the same from two directions. In both cases condemnees were allowed damages for interference with access.

"The impairment of the right [of access] is a legal injury differing in degree only from its total destruction." *Walsh v. City of Scranton*, 23 Pa. Superior Ct. 276, 278 (1903). If the impairment of access in the *Melon*, *Hedrick* and *Bodemer* cases was held to be compensable then there certainly must be a compensable injury to petitioners in the case now before us, since the facts of record indicate that their injury is closer in degree to total destruction (deprivation) of access than was that of the condemnee in any of the earlier cases.

Accordingly, we find that the board of view in its report improperly found that petitioners were not entitled to damages under Sections 612 and 613 of the Eminent Domain Code of 1964 and we reverse that finding.

DECREE

AND NOW, this 7th day of June, 1973; petitioners' appeal from and objections to the report of the board of view are sustained and this case is referred back to the board of view for determination by them of the amount of damages to which petitioners are entitled.

By the Court,

Paul R. Beckert

APPENDIX D

Access to Petitioners' property has been altered in the following ways:

1. Access from the north:

(a) Before reconstruction—vehicles traveling south on Route 1 made a left turn onto Street Road, and a left turn thereafter into the subject property. See Diagram A.

(B) After reconstruction—vehicles traveling south on Route 1 turn right to a jug handle, proceed under Route 1 in an easterly direction to New Street Road and proceed on New Street Road to Kingston Way, make a right turn at Kingston Way and proceed in a southerly direction to Old Street Road, make a right turn on Old Street Road and proceed in a westerly direction to the subject property. The additional distance which cars must travel is approximately 1 mile. See Diagram B.

DIAGRAM A

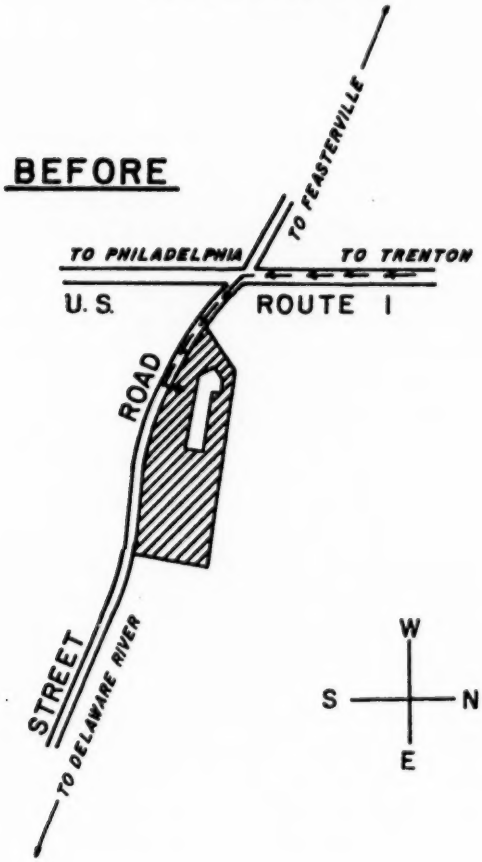

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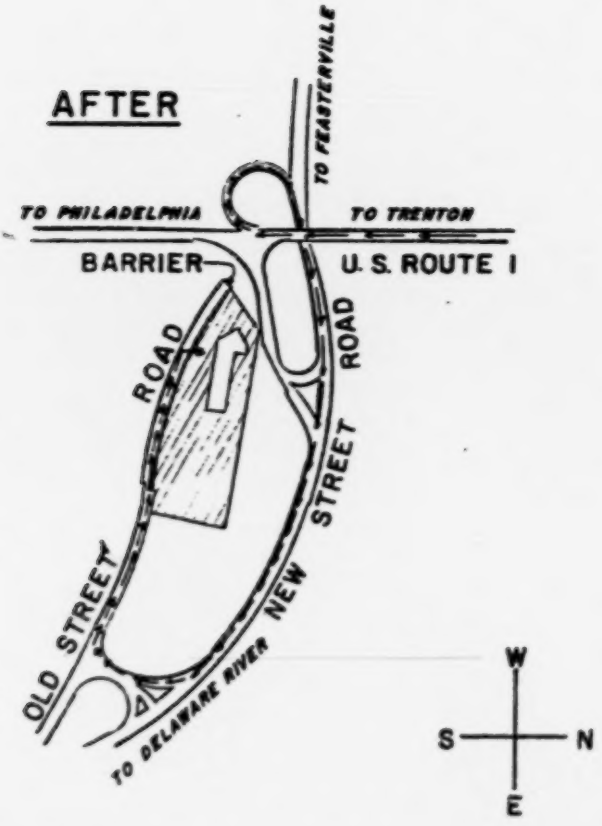
DIAGRAM B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2. Access from the south:

(a) Before reconstruction—vehicles traveling north on Route 1 made a right turn onto Street Road and then a left turn into the subject property. See Diagram C.

(B) After reconstruction—vehicles proceeding in a northerly direction would pass Old Street Road, make a right turn onto a ramp and proceed in an easterly direction to New Street Road, proceed on New Street Road to Kingston Way, make a right turn onto Kingston Way and proceed in a southerly direction to Old Street Road, turn right at Old Street Road and proceed in a westerly direction to the subject property which is entered by a right turn. The additional distance which must be traveled is just under 1 mile. See Diagram D.

DIAGRAM C

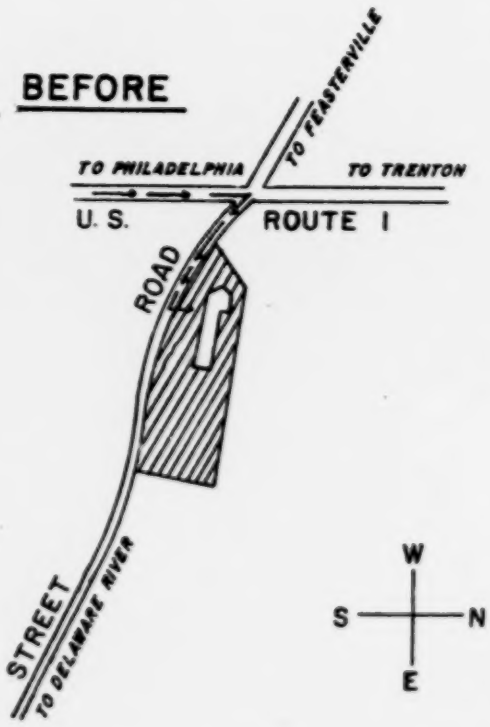
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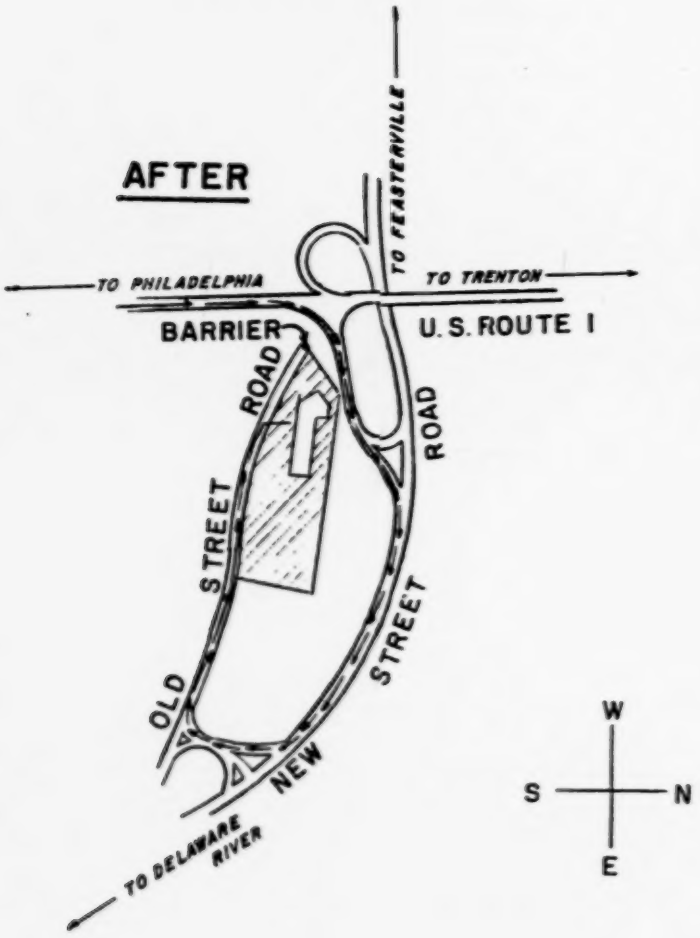
DIAGRAM D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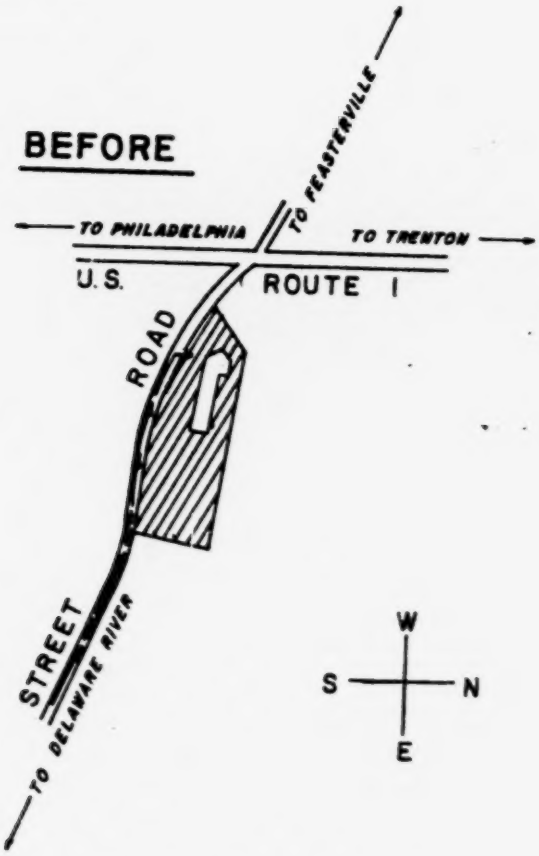
3. Access from the east:

(A) Before reconstruction—vehicles heading west on Street Road merely had to make a right turn onto the subject property. See Diagram E.

(B) After reconstruction—vehicles traveling west on New Street Road make a left-hand turn at Kingston Way, proceed in a southerly direction on Kingston Way to Old Street Road where they turn right, and travel again in a westerly direction on Old Street Road to the subject property which is entered by a final right turn. The additional distance traveled is just under 1/10th of a mile. See Diagram F.

DIAGRAM E


BEFORE
TO FEASTERVILLE
TO PHILADELPHIA
TO TRENTON
U.S.
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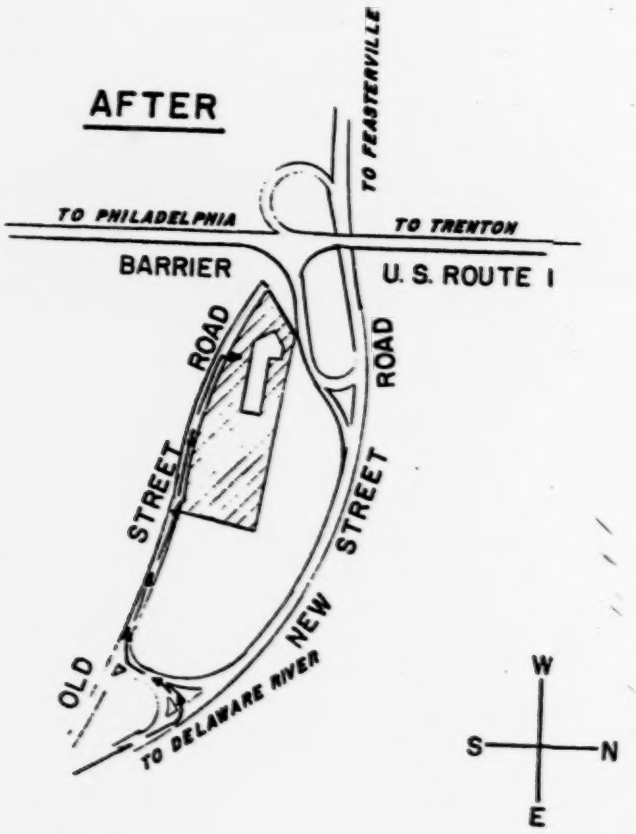
ROAD
STREET
TO DELAWARE RIVER
W
S
N
E

DIAGRAM F

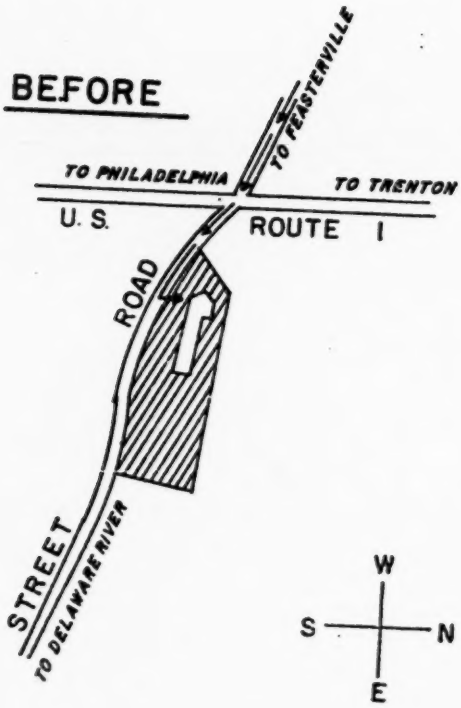

AFTER
TO FEASTERVILLE
TO PHILADELPHIA
TO TRENTON
BARRIER
U. S. ROUTE 1
OLD
ROAD
STREET
NEW
ROAD
STREET
TO DELAWARE RIVER
W
S
N
E

4. Access from the west:

(A) Before reconstruction—vehicles going east on Street Road simply crossed Route 1 and made a left turn into the subject property. See Diagram G.

(B) After reconstruction—vehicles proceed in an easterly direction under Route 1 to Kingston Way, make a right turn on Kingston Way and proceed in a southerly direction to Old Street Road, turn right again at Old Street Road and proceed in a westerly direction to the subject property which is entered by a final right turn. The additional distance traveled is 1¼ miles. See Diagram H.

DIAGRAM G


BEFORE
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TO PHILADELPHIA
TO TRENTON
U. S.
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STREET
TO DELAWARE RIVER
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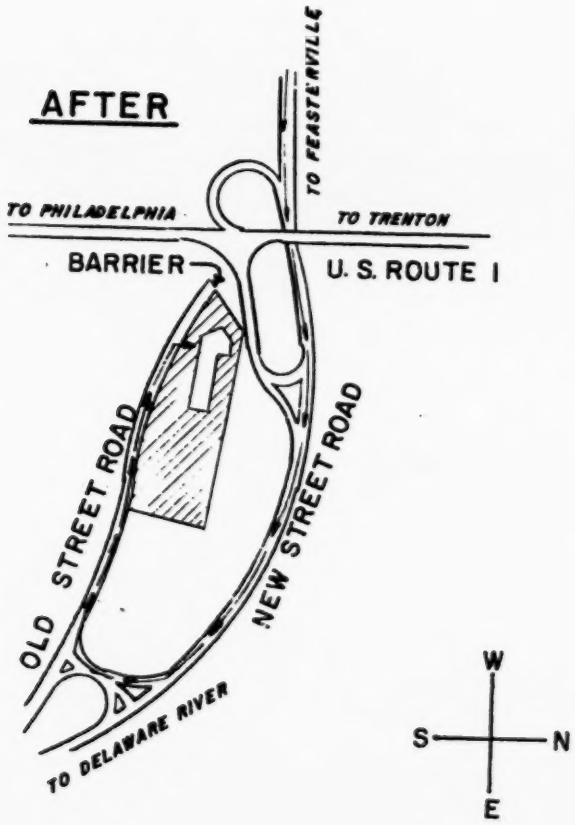
DIAGRAM H


AFTER
TO FEASTERVILLE
TO PHILADELPHIA
TO TRENTON
BARRIER
U. S. ROUTE 1
OLD STREET ROAD
NEW STREET ROAD
TO DELAWARE RIVER
W
S
N
E

APPENDIX E

Petition for Appointment of Board of View, Paragraph 10(g)

> "Petitioners contend that they are entitled to compensation for the aforementioned damage by reason of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States. . ."

Appeal from and Objections to Report of Board of View, Paragraph 5(d):

> "The Board of View did not find that the Condemnees were entitled to damages pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States."

SUPREME COURT, U. S.

DEC 13 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1974
No. 74-590

PREMISES OF RICHARD KASTNER, t/a LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, t/a BIG C DISCOUNT DEPARTMENT STORE, Tenant, DESCRIBED IN DEED BOOK 1725, Page 231, *Petitioners*

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, *Respondents*

In Re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation (Formerly Department of Highways), for Right-of-Way for Legislative Route 252, Sec. 10-A, in Bensalem Township, Bucks County, Pennsylvania.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania is unreported and is No. 1478 Allocatur Docket. The opinion of the Commonwealth Court of Pennsylvania, which reversed the decision of the Court of Common Pleas of Bucks County in dismissing Petitioner's claim, is reported in 13 Commonwealth Ct. Rptr. 525 (1974). The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, is reported in 24 Bucks County Law Rptr. 163 (1973). The Commonwealth Court reversed the judgment of the Court of Common Pleas of Bucks County, Pennsylvania, which had remanded the case to the Board of View. Petition for allowance of appeal from the Commonwealth Court of Pennsylvania to the Supreme Court of Pennsylvania, was denied by said Supreme Court on August 26, 1974.

JURISDICTION

The Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Where the Commonwealth of Pennsylvania, Department of Transportation has constructed a new highway (New Street Road), where the original highway is barricaded at the intersection of Old Street Road and U.S. 1, forming a cul-de-sac, where no land has been taken, where the property in question does not abut the new improvement, and where those utilizing the subject property need travel only a short distance in order to reach the general system of highways, does a decision of the Commonwealth Court of Pennsylvania denying liability, effect a denial of just compensation under the Fifth Amendment, or a denial of due process under the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

COUNTER-STATEMENT OF THE CASE

Petitioner's property is located on the north side of what is commonly known as Old Street Road (Legislative Route 252), approximately two hundred fifty feet east of Route 1 (Legislative Route 281). Prior to 1969 Old Street Road intersected Route 1. In 1969 construction began on the relocation of Street Road. New Street Road was laid out to the north of Old Street Road, and, as part of the traffic engineering plans for Street Road and Route 1, Old Street Road was barricaded just to the east of the intersection of Old Street Road and Route 1, resulting to the dead-ending of Old Street Road.

Before these changes were made, the property could be reached in the following ways; vehicles traveling south on Route 1 made a left-hand turn into the subject property. Vehicles traveling north on Route 1 made a right-hand turn onto Street Road and then a left-hand turn into the subject property. Vehicles traveling east on Street Road made a left-hand turn into the property and those traveling west made a right-hand turn.

Because the intersection of Old Street Road and Route 1 is no longer open, access to the subject property has been affected in the following ways: vehicles traveling south on Route 1 turn right off Route 1 onto a jug handle, proceed under Route 1 to Kingston Way, make a right turn at Kingston Way which runs into Old Street Road, make another right-hand turn onto

Old Street Road and then a right-hand turn into the subject property. This is a distance of approximately one mile.

Vehicles traveling north on Route 1 have a choice of routes to arrive at the subject property. One route is similar to that used by vehicles traveling south. The traffic can use a ramp from Route 1 to Street Road, proceed to Kingston Way, Old Street Road and the subject property. This is a distance of seven-tenths of a mile. Another way is to turn right off Route 1 at the first traffic light south of Street Road and drive along Old Trevose Road, Windsor Drive and Craeton Drive to the subject property, a distance of about nine-tenths of a mile from Route 1. An alternate use of this route would be to make a right-hand turn at the first street north of the intersection with the traffic light, proceed onto Windsor Drive in an easterly direction, then north on Craeton Drive to Old Street Road and then to the entrance of the subject property, seven-tenths of a mile from Route 1.

Vehicles traveling east on New Street Road would pass under Route 1 and make a right-hand turn onto Kingston Way, from there to Old Street Road and the subject property, a distance of approximately nine-tenths of a mile.

Vehicles traveling west on New Street Road would make a left-hand turn onto Kingston Way and then proceed to Old Street Road and the subject property. This is a distance of three-tenths of a mile. All of these additional distances are as estimated by the Pennsylvania Department of Transportation.

No land of the Petitioner herein was condemned or appropriated and, Petitioner's property does not abut the improvement on New Street Road.

On November 25, 1970, the Commonwealth of Pennsylvania, Department of Transportation, was served with a copy of a petition for appointment for a Board of View, along with a copy of an order for appointment of Board of View. The Board of View was appointed and the view of the premises set for January 4, 1971 was continued pending the outcome of the Commonwealth's preliminary objections.

Preliminary objections were overruled and a hearing was held before the Board of View on July 16, 1971 for the taking of testimony. Petitioner's property has not been condemned. Their petition was brought pursuant to Sections 612 and 613 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P. L. 84, 26 P.S. §612, §613, which permit recovery for interference with access where the property in question has not been formally condemned.

At the Viewers' hearing, the Commonwealth presented no testimony on damages. Petitioner herein presented the testimony of two witnesses, who testified that the resultant damages to claimants amounted to $340,000.00 and $350,000.00, respectively. The Viewers found that Petitioner was not entitled to damages under the aforesaid sections of the Eminent Domain Code.

Petitioner herein appealed from and objected to the Viewers' report, basing their appeal on Section 517 of the Eminent Domain Code. The Court of Common Pleas of Bucks County found that the activities of the

Commonwealth resulted in a "taking" or compensable injuries to claimants' property, modified the Viewers' report accordingly, and directed that the case be resubmitted to the same Board of View for the purpose of taking additional testimony on the amount of damages to which claimants are entitled. As the action of the Court of Common Pleas was a "final order" within the purview of Section 517 of the Eminent Domain Code, the Commonwealth then appealed that order to the Commonwealth Court of Pennsylvania. On May 20, 1974 said Commonwealth Court unanimously reversed the decision of the Court of Common Pleas of Bucks County, and judgment was entered for the Commonwealth; subsequently, the Petitioner herein petitioned the Supreme Court of Pennsylvania for allowance of appeal from said judgment of the Commonwealth Court. On August 26, 1974 the said Petition was denied per curiam.

ARGUMENT

Where the Commonwealth of Pennsylvania, Department of Transportation has constructed a new highway (New Street Road), where the original highway is barricaded at the intersection of Old Street Road and U.S. 1, forming a cul-de-sac, where no land has been taken, where the property in question does not abut the new improvement, and where those utilizing the subject property need travel only a short distance in order to reach the general system of highways, a decision of the Commonwealth Court of Pennsylvania denying liability, does not effect a denial of just compensation under the Fifth Amendment, or a denial of due process under the Fourteenth Amendment of the United States Constitution.

The question presented by the Petitioner is extraordinarily misleading in several respects:

A. The Commonwealth did not vacate the entirety of the street upon which the Petitioner's property abuts, but only barricaded the said street, Old Street Road, slightly to the east of the intersection of that street and Route 1, which resulted in a cul-de-sac. Ingress and egress from Old Street Road to the property and from the property back to Old Street Road, remain unchanged, and of course, as the facts indicate, access to the general system of highways (New Street Road) is readily available to the subject property by

the expedient of traveling east on Old Street Road and making a right-hand turn onto Kingston Way which leads to New Street Road.

B. Inherent in the question is a statement, as a fact, that there was a substantial interference with access as a result of the Commonwealth's activities. The Commonwealth Court of Pennsylvania held precisely the opposite and found that this was an inconvenience of access, nothing more, and that if there was an alteration in the highest and best use, and a diminution in the value of the property, it was the result of a diversion of traffic from relocated Old Street Road onto New Street Road, a modern four-lane facility.

C. The statement inherent in the question, that Petitioner has sustained damages in the amount of $360,000.00, is purely self-serving in that it represents testimony presented only at a Viewers' hearing by the Petitioner. The Commonwealth, taking the position that there was no cause of action, this position to be upheld later by the Commonwealth Court and the Supreme Court of Pennsylvania, did not present testimony relative to damages.

The Commonwealth submits that it has not violated the Fifth Amendment of the United States Constitution because it has not taken private property or property rights for public use, relating to the subject property, within the purview of the Eminent Domain Code of Pennsylvania, or well established case law in Pennsylvania and other jurisdictions. The Commonwealth further submits that it is not in violation of the Fourteenth Amendment of the United States Constitution in that is has not deprived the Petitioner of prop-

erty, and that certainly there has been due process of law, this matter having been heard by the Viewers, by the Court of Common Pleas of Bucks County, by the Commonwealth Court of Pennsylvania, and having been presented to the Supreme Court of Pennsylvania and rejected by that tribunal.

The Commonwealth finds itself in complete agreement with the statement made in Petitioner's brief on page 8 thereof: "It is obvious that not every property owner who suffers a loss in value of his property has a constitutional right to just compensation, even if the loss is occasioned by the construction of a new highway." This is clearly one such case.

Of course, the Commonwealth is liable for the consequences of a substantial interference with access; this is clearly spelled out in §612 of the Eminent Domain Code; however, under the facts no such interference can be deemed to have occurred. No land has been condemned or otherwise acquired from the Petitioner, and the Petitioner does not abut the improvement on New Street Road, a requirement for consequential damages under any circumstances, within the purview of §612 of the Eminent Domain Code. The subject property is, as stated, some 300 feet distant from the intersection which was barricaded, and this had the effect of diverting traffic onto New Street Road. This hardly constitutes being rendered "slightly short of totally landlocked." The Petitioner, having frontage on Old Street Road had two directions available to him in which to travel, and not four as alleged. Upon leaving the property, he could travel either east or west which was the direction of the intersection

with U.S. No. 1. Following construction, he still has the ability to make a left-hand turn onto Old Street Road travel a short distance east, at which time he may arrive at the general system of roads which take him speedily in any direction he chooses.

The Petitioner says on page 8 of his brief that the State Courts, in considering the national standard of the constitution requirement of just compensation, have reached varying results. This statement is so broad as to be virtually meaningless. While every state has acknowledged its obligation to fulfill its constitutional requirement of just compensation, quite naturally in fifty jurisdictions there has been some difference of opinion with regard to what constitutes an interference with access. The fact is, the Commonwealth of Pennsylvania, and at least ten other states uniformly hold that the creation of a cul-de-sac, with no taking of land, and which allows a reasonable means of access to the system of highways, is not a taking, injury or destruction, and gives rise to no cause of action in eminent domain.

The Courts in Pennsylvania, contrary to the statement by the Petitioner, have by no means differed with regard to circuity of access, as opposed to interference, with access generally, and with regard to the creation of the circuitous situation known as a cul-de-sac, specifically. *In re: Melon Street,* 182 Pa. 397, 38 A. 482, decided in 1897, and relied upon heavily in previous arguments by the Petitioner herein was overruled 36 years later in *Fecher v. Allegheny County,* 313 Pa. 191, 169 A. 87 (1933). The Court, in that case stated:

> "The basis of Plaintiff's complaint on the score of deprivation of access is that it is now necessary for one to travel a slightly greater distance from her property than formerly in order to reach the main highway at the site of the crossings. It must now be regarded as a settled fact that such a situation cannot of itself give rise to a claim for damages. The underlying principle is damages will not be allowed where the effect of disturbance to the highway is merely to cause the owner to travel a short distance further in order to reach the system of streets in that direction."

This principle has been strengthened in Pennsylvania over the years and is the law today.

The leading cases in Pennsylvania are *Wolf v. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966); *Mitchell Condemnation Case,* 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1967), and *Hession Condemnation Case,* 430 Pa. 273, 242 A. 2d 432 (1968), cert. denied in 393 U.S. 1049. In the *Mitchell* case, supra, where damages were sought for the result of the vacating of a road near the claimant's property, and denied, the Superior Court of Pennsylvania relied upon a California case, *Breidert v. Southern Pacific Company,* 39 Cal. Rptr. 903, 61 Cal. 2d 659, 394 P. 2d 719 (1964). In the *Hession* case, supra, the Supreme Court of Pennsylvania, cites a Missouri case, *State Highway Commission of Missouri v. Meier,* 388 S.W. 2d 855 (1965), cert. denied in 382 U.S. 846. That case set the standard for the three leading Pennsylvania cases cited above, in stating:

> "An abutting property owner's right to access . . . includes the further right to connect with or reach the system of public highways . . . The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right of way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the state."

Other jurisdictions with identical holdings as those of the leading Pennsylvania cases are New Mexico: *State ex rel. State Highway Commission vs. Silva,* 71 N.M. 350, 378 P. 2d 595 (wherein *Re Melon Street* was specifically rejected); Wisconsin: *Stefan Auto Body v. State Highway Commission,* 21 Wisc. 2d 263, 124 N.W. 2d 319 (1961); Kansas: *Brook v. State Highway Commission,* 195 Kan. 361, 404 P. 2d 934 (1965); Minnesota: *State by Mondale vs. Gannons, Inc.,* 275 Minn. 14, 145 N.W. 2d 321 (1966); Nebraska: *Berlowitz vs. State Department of Roads,* 180 Neb. 164, 141 N.W. 2d 764 (1966); North Carolina: *State Highway Commission vs. Wortman,* 4 N.S. App. 546, 167 S.E. 2d 462 (1969); Arizona: *State ex rel. Herman vs. Schaffer,* 105 Ariz. 478, 467 S.W. 2d 66; California: *People by Department of Public Works vs. Becker,* 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968); and Idaho: *James vs. State,* 88 Idaho 397 P. 2d 766 (1964).

The Commonwealth Court of Pennsylvania in reversing the decision of the Court of Common Pleas of Bucks County, makes it clear that both that Court

and the Petitioner herein have confused loss of access and diversion of traffic, in taking the position that damages were payable, when by the demonstrable facts, traffic has been diverted onto a parallel, competing highway, as a result of construction of said highway and the placement of a barricade creating a cul-de-sac on the highway on which the Petitioner's property fronted. Thus, however much the Petitioner herein may protest that his claim is not based upon diversion of traffic, the facts themselves lead inescapably to this conclusion. The Commonwealth Court on page 5 of its opinion states:

> "The following quotation from Hession could just as readily have been written of this case and its record:
>
> 'The record before the viewers makes it evident that the damage suffered by appellees is a product of the fact that the elevated highway has transformed what was once a heavily traveled highway (State Road) into a street which carries primarily local traffic only.[1] In essence, appellees base their claim on a belief that the change in the traffic pattern caused by the construction of the expressway and the concomitant decrease in the

---

[1] Prior to the construction of the elevated highway, State Road was used to avoid heavy traffic on both Torresdale and Frankford Avenues. The testimony of appellees' two real estate appraisers makes it evident that their estimates of the damage suffered is based totally upon loss of traffic. One appraiser characterized the present location of appellees' tavern restaurant as "inconspicuous" while the other stated that the elevated highway had destroyed all "profitable use" of the premises.'

value of their land as a business property is compensable; they urge this Court to distinguish between properties used for business purposes and those employed as residences and contend that business establishments do have a compensable interest in the traffic pattern existing before a street has been vacated. This argument was considered and expressly rejected in Wolf v. Department of Highways, 422 Pa. 34, 220 A. 2d 868 (1966).' 430 Pa. at 278-9, 242 A. 2d at 434-5."

Since, in both the *Hession* case and the present one, a heavily traveled State highway was converted into a street which carries primarily local traffic only, it is well to point out, as does the Petitioner at the bottom of page 10 on his brief, that certiorari was denied in the *Hession Condemnation Case,* 393 U.S. 1049 (1969). Inasmuch as the *Hession* case is squarely in point with the present one, the Commonwealth submits that this Honorable Court would have no reason to entertain certiorari.

While the series of federal cases cited by the Petitioner are of interest academically, all of them are factually dissimilar to the present case, none of them are in point, and in no manner establish that the Commonwealth has violated either the Fifth or Fourteenth Amendment of the United States Constitution, by changing the traffic flow on the highway upon which the subject property abuts.

In *Martin v. Creasy,* 360 U.S. 219 (1959), the distinction between that case and the present one is quite obvious. In that case there was an attempt to obtain injunctive relief by *abutting* (emphasis supplied)

property owners, and to have the "Pennsylvania Limited Access Highway Act" declared unconstitutional. The court was there concerned with the constitutionality of a statute, as opposed to the constitutional right of just compensation. This Honorable Court held that where the Pennsylvania State Courts had determined that the statute in question provided an adequate procedure, consistent with the due process requirements of the United States Constitution, whereby property owners, fronting on such a highway, rendered limited access by the Commonwealth, could seek damages, then, this Court would have no reason to adjudicate. *Creasy v. Lawler,* 8 Pa. D. & C. 2d 535 (1956), was the Court of Common Pleas decision on *Martin v. Creasy,* supra. There the court held that the "Limited Access Highway Act" is constitutional, since it contains a procedure whereby affected property owners may litigate on the question of compensation for loss of access. Again, this is in no way factually related to the present case. In *Creasy v. Stevens,* 160 Fed. Supp. 404 (1958), the federal District Court granted an injunction on activity under the "Limited Access Highway Act", on the ground that it was in violation of the due process clause of the Fourteenth Amendment. On appeal to this Honorable Court, the decision was reversed, under the citation earlier mentioned, *Martin v. Creasy,* 360 U.S. 219 (1959), because as stated, there was indeed a procedure for the preservation of the rights of the property owners, and therefore no violation of the Fourteenth Amendment of the United States Constitution. The reason for the inclusion of the *Creasy* cases is obscure. If anything, they solidify the attitude of this Honor-

able Court in not wishing to intervene with respect to the merits of a given eminent domain case, as concerns the compensability of an element of damage, or indeed, whether or not there is a cause of action, so long as the claimant has full access to the courts for the purpose of endeavoring to establish his claim. As this Court states in *Martin v. Creasy,* 360 U.S. 219, on page 234: "There is no reason to suppose that the Commonwealth of Pennsylvania will not afford full constitutional scope to the statutory phrase 'actual taking of property'."

In his brief on page 14, the Petitioner herein makes reference to a statement made by the attorney for the Commonwealth in his brief in the *Hession* condemnation case, supra, where, although such facts are not involved in the *Hession* case, a statement is made to the effect that the creation of a cul-de-sac would be compensable. In addition, the Petitioner has filed a copy of the Commonwealth's brief in the *Hession* case together with his petition. The Commonwealth submits that such a reference is a highly improper one in several respects. The opinion was personal to the attorney drafting the brief in the *Hession* case, was directly contrary to existing case law in the State of Pennsylvania, and the Commonwealth Court, in deciding the case at bar, clearly understood this in ignoring the comment, which was called to its attention. As a matter of fact it is that very decision, the *Hession* case, upon which the Commonwealth Court bases a good deal of its reasoning. Even assuming that there is any degree of propriety in discussing a statement made in a brief in another case, rather than the law of Pennsylvania, it should

then be noted that the statement contains the following: "In order for recovery to be had when a street is vacated, but no land is taken, the property owner must be left in a position which is *unique and substantially different* than that of his neighbors and the public generally." (Emphasis supplied.) The Petitioner can hardly be said to be in a unique and substantially different position than that of his neighbors, when in fact Old Street Road contains four other properties, all of which are now on a street which contains a cul-de-sac on one end, and allows access to the general system of streets on the other.

Chicago B & Q R Company v. Chicago, 166 U.S. 226 (1897), and *Duncan v. Louisiana,* 391 U.S. 145 (1968), cited by the Petitioner in support of the proposition that a taking in a constitutional sense is not limited to an actual physical possession or seizure, are not disputed by the Commonwealth in terms of the general principle. The Eminent Domain Code of Pennsylvania makes it quite clear that under certain enumerated circumstances, damages are payable in Eminent Domain without a physical appropriation of the property. The creation of a cul-de-sac is not one such circumstance. *Duncan v. Louisiana,* 391 U.S. 145 (1968), cited by the Petitioner, is a criminal case where, although the defendant stood accused of a crime punishable by a maximum of two years imprisonment and a $300.00 fine, he was nevertheless entitled to a jury trial, within the purview of the Fourteenth Amendment of the United States Constitution. *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922), cited by the Petitioner, was a case where the act involved was declared unconstitutional because it did

not provide for compensation. Contrary to the statement made by Petitioner herein, the act did more than "merely prohibit underground mining". Under the facts in the case, there was the taking of a substantial subsurface property interest. Another case relied upon by the Petitioner is the *United States v. General Motors,* 323 U.S. 373 (1945), which was a federal eminent domain action, where condemnor temporarily occupied a portion of a leased building, and there, quite predictably, the court held that the Fifth Amendment of the United States Constitution required the payment of compensation.

That low-flying aircraft can cause compensable damage to property, is not herein disputed, and where in *United States v. Causby,* 328 U.S. 256 (1946), military aircraft destroyed the subject property's use as a commercial chicken farm, it was held that compensation was payable. Of course, the Court was quick to point out that these damages "were the product of a direct invasion of condemnee's domain". In the present case there is no invasion, direct or indirect. Similarly, in a case cited by the Petitioner herein, *Griggs v. Allegheny County,* 269 U.S. 84 (1962), where low-altitude flights over a private home destroyed the possibility of peaceful enjoyment of this property, this destruction was held to be compensable. It is apparent that all of the federal cases cited by the Petitioner in support of his position are so alien to the factual circumstances in the present case, as to be of no value whatever in determining the constitutional right to damages, where in fact nothing more has occurred than a diverting of traffic.

The Commonwealth of Pennsylvania has set forth clear and definitive standards, under Section 612 and Section 613 of the Eminent Domain Code of 1964, as amended, for the compensability of the legitimate interference with access in the absence of a taking of land, and has clearly established by this act and by case law, the distinction between such an interference and a factual circumstance, following construction, where the property owner has a reasonable means of access to the general system of highways. The Petitioner has such a reasonable means of access, and need travel only several hundred feet in order to reach the system. He is therefore not an innocent victim of progress, as alleged, but a property owner seeking to assert a constitutional right that does not exist; namely, the right to the flow of traffic that originally passed his door. The Commonwealth submits that there are indeed guidelines with respect to the right to damages of a landowner, as a result of highway construction, relocation and vacation, and trusts that this Honorable Court will leave the implementation of such guidelines to the sound discretion of the state courts.

CONCLUSION

Therefore, your respondent, the Commonwealth of Pennsylvania acting through its Department of Transportation, respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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